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Supt. Ct

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1158

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

FILED APRIL 13, 1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1158

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER

Appeal from the District Court of the United States for the Eastern District of Louisiana

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INDEX

1 [Caption omitted.]

2 In District Court of the United States for the Eastern District of Louisiana, New Orleans Division

Civil Action Number 956

SAMUEL G. WIENER, WILLIAM B. WIENER, JACQUES L. WIENER, PLAINTIFFS

vs.

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Complaint

Filed Nov. 14, 1944

3 *To the Honorable, the District Court of the United States for the Eastern District of Louisiana:*

I

Plaintiffs, Samuel G. Wiener, William B. Wiener, and Jacques L. Wiener, are citizens of the United States and of the State of Louisiana, and are resident and domiciled in Shreveport in the Western District of Louisiana.

II

The defendant, Joachim O. Fernandez, is the Collector of Internal Revenue of the United States for the District of Louisiana. His official residence, and his personal domicile are both in the city of New Orleans, in the Eastern District of Louisiana, and he is being sued herein in his official capacity as Collector of Internal Revenue.

III

The amount in controversy is the sum of One Hundred Sixty-Two Thousand Three Hundred Twenty-Nine Dollars and Fifty-Nine Cents ($162,329.59), together with six (6%) percent per annum interest thereon from August 10th, 1944.

IV

4 The amount sued for represents part of a payment made to the aforesaid Collector of Internal Revenue in virtue of an estate tax deficiency assessment levied against these

plaintiffs by the Bureau of Internal Revenue, and, therefore, paid by them to the aforesaid Collector solely by reason of the necessity and compulsion of such payment arising out of such deficiency assessment.

V

Said deficiency Estate Tax purported to have been levied upon these plaintiffs as the sole heirs of Sam Wiener, Jr., a citizen of the United States and a resident of the Western District of Louisiana, who died in Shreveport on December 1, 1942. The Estate Tax return required by law was duly filed by plaintiffs, and payment made thereunder in the sum of One Hundred Seven Thousand One Hundred Seventy-Eight Dollars and Fifty-Seven Cents ($107,178.57).

VI

After the filing of said Estate Tax return, upon an audit thereof by the Revenue Agent, a deficiency was proposed of One Hundred Sixty-Five Thousand Eight Hundred Twenty One Dollars and Fifty-Seven Cents ($165,821.57), together with interest amounting to Three Thousand Eight Hundred Seven Dollars and Eight Cents ($3,807.08), which total—amounting to One Hundred Sixty-Nine Thousand Six Hundred Twenty-Eight Dollars and Sixty-Five Cents ($169,628.65)—was, as aforesaid, paid by these plaintiffs to the aforesaid Collector on August 10, 1944.

5

VII

The said decedent, the father of these plaintiffs, had been a resident and citizen of Louisiana, and domiciled therein, for more than forty years. In 1907 he was married to Florence Loeb, with whom he lived continuously as husband and wife until his death. During said marriage, he and his wife acquired a large amount of community property, and he acquired some property in the State of Mississippi wherein the community system does not prevail.

VIII

The said decedent died testate, leaving his entire estate to these plaintiffs. The will of the decedent was duly probated in the First Judicial District Court of Caddo Parish, Louisiana, wherein, consistently with the law of Louisiana, the estate being entirely solvent and debts (with the exception of death taxes) small, there was no administration. Consequently, no Executor or Administrator was ever appointed, but these plaintiffs were sent into possession

by said Probate Court of their father's estate as his sole and unconditional heirs.

IX

The final Estate Tax Return, form 706, was timely filed by the three heirs above named, disclosing an estate tax liability of $107,078.47, which tax was, contemporaneously with the filing of the return, duly paid. In said Estate Tax Return, the
6 plaintiffs reported all of the property of which their father had been the owner, and of which he had the power of disposition, namely, the whole of his separate property, together with the undivided one-half which, under the law of Louisiana, he owned in all of the community assets.

X

The aforesaid deficiency assessment, paid as aforesaid by these plaintiffs, was based upon the action of the Bureau of Internal Revenue in its adjustment of the estate tax liability, through its inclusion in the taxable estate of the decedent of the value of the entirety of the assets of the community, together with some readjustment of valuations.

Whereupon, as above recited, the aforesaid notice of deficiency issued and payment was then made, solely to avoid the accumulation of interest and the imposition of penalties which would otherwise have accumulated and been imposed if the additional assessment had not been so paid. No claim is made by these plaintiffs in respect to increases in valuations over those proposed in their estate tax return.

The amount herein sued for represents that part of the deficiency assessment which was based by the Bureau of Internal Revenue solely upon its application of Section 402 (b) (2) and Section 404 (a) of the Revenue Act of 1942 (56 Statutes at Large, 942 and 944), under which said Bureau undertook to base the Estate
7 Tax not upon the assets of the decedent, but upon the assets in which the decedent and his surviving widow were each an owner of an equal undivided one-half interest.

XI

Promptly upon the payment of the said deficiency, to wit, on August 14, 1944, these plaintiffs filed, as provided by law, with the said Collector of Internal Revenue their claim for refund in the sum herein demanded.

The claim for refund was based upon the reasons set out in paragraph XII of this complaint; was duly transmitted by the Collec-

tor to the Commissioner of Internal Rvenue; and was by the said Commissioner formally rejected on the 31st day of October 1944.

XII

And now these plaintiffs show that the said additional assessment purports to have been made under the provisions of Section 402 (b) (2) of the Revenue Act of 1942, and Section 811 (e) of the Internal Revenue Code as amended thereby, and under Section 404 (a) of the Revenue Act of 1942, and Section 811 (g) (4) of the Internal Revenue Code as amended thereby, each of which provisions plaintiffs now aver, as they set out in their aforesaid claim for refund, to be violative of the Constitution of the United States, and hence null and void and without legal effect.

8 Plaintiffs show that the statutory provisions above referred to are inconsistent with and violative of the following provisions of the Constitution of the United States:

(a) the provisions of the Fifth Amendment to the Constitution of the United States, which provide that no person shall be deprived of property without due process of law;

(b) Article 1, Section 8, which provides that all duties, imposts and excises shall be uniform throughout the United States;

(c) Article 1, Section 2 and Section 9, which provide that direct taxes shall be apportioned among the several states in accordance with their population;

(d) the provisions of the Tenth Amendment to the Constitution of the United States, which provides that all powers not granted to the United States by the Constitution and its amendments, are reserved to the several states and to the people thereof.

XIII

During the existence of the marriage between decedent and his surviving wife, he purchased fifteen life insurance policies in various amounts, all payable directly to Florence Loeb Wiener as beneficiary. One-half of the amount payable to said beneficiary under said policies was properly returned in the Estate Tax Return. The additional assessment was based, in part, upon the action of the taxing authorities in including in the taxable estate the entire amount of the said insurance, instead of the one-half interest owned by the decedent under the local law.

9 This action purported to have been had under the provisions of Section 404 (a) of the Revenue Act of 1942 and Section 811 (g) (4) of the Internal Revenue Code as amended thereby: all of which provisions these claimants assert to be null and void, as violative of the Constitution of the United States as above set out in detail.

And plaintiffs aver that any and all regulations of the Bureau of Internal Revenue purporting to carry into effect said unconstitutional statutes, are likewise null and void.

Wherefore, plaintiffs demand judgment against said defendant for the aforesaid sum of One Hundred and Sixty Two Thousand Three Hundred Twenty-Nine Dollars and Fifty-Nine Cents ($162,329.59), together with interest as above claimed, and all costs of suit.

Sidney L. Herold,
SIDNEY L. HEROLD.
1625 Slattery Building.
Shreveport, Louisiana.
Charles E. Dunbar, Jr.,
CHAS. E. DUNBAR, JR.,
United Fruit Building.
New Orleans, Louisiana.

HEROLD, COUSIN & HEROLD,
1625 Slattery Building,
Shreveport, Louisiana.
PHELPS, DUNBAR, MARKS & CLAVERIE,
United Fruit Building,
New Orleans, Louisiana.

10 In United States District Court

Answer

Filed December 8, 1944

Comes now defendant by his attorney, Herbert W. Christenberry, United States Attorney for the Eastern District of Louisiana, and in answer to plaintiffs' complaint admits, denies, and alleges as follows:

I

Admits the allegations contained in paragraph I of plaintiffs' complaint.

II

Admits the allegations contained in paragraph II of plaintiffs' complaint.

III

Admits the allegations contained in paragraph III of plaintiffs' complaint.

IV

Admits the allegation contained in paragraph IV of plaintiffs' complaint.

V

Admits the allegations contained in paragraph V of plaintiffs' complaint and avers that the deficiency in federal estate taxes was duly assessed against plaintiffs and each of them as transferees of the property of the estate of Samuel Wiener, deceased.

VI

Admits the allegations contained in paragraph VI of plaintiffs' complaint.

VII

Admits the allegations contained in paragraph VII of plaintiffs' complaint.

VIII

Admits the allegations contained in paragraph VIII of plaintiffs' complaint.

IX

Denies all the allegations contained in paragraph IX of plaintiffs' complaint, except admits that a federal estate tax return on Form 706 was filed by plaintiffs reporting a federal estate tax due of $107,078.47 which was paid and admits that there was reported in the federal estate tax return, as part of the gross estate for estate tax purposes, decedent's separate property and one-half of the community property.

X

Admits the allegations contained in paragraph X of plaintiffs' complaint, except denies that the estate taxes sought to be recovered were based upon the inclusion in the taxable estate of property owned by decedent and his widow in equal, undivided one-half interests.

XI

Admits the allegations contained in paragraph XI of plaintiffs' complaint.

11

XII

Denies all the allegations contained in paragraph XII of plaintiffs' complaint.

XIII

Denies all the allegations contained in paragraph XIII of plaintiffs' complaint, except admits that during the existence of the marriage between decedent and his widow decedent purchased fifteen life insurance policies, all payable to Florence Loeb Wiener, as beneficiary; that one-half of the amount payable to the beneficiary under the policies was returned in the federal estate tax return and that the additional assessment was based in part upon the inclusion in the taxable estate of the entire amount of the insurance under the provisions of Section 811 (g) of the Internal Revenue Code, as amended by Section 404 (a) of the Revenue Act of 1942.

Wherefore, having fully answered defendant prays judgment dismissing the complaint and for costs.

(Signed) HERBERT W. CHRISTENBERRY,
United States Attorney.

(Signed) A. P. SCHIRO, III,
A. P. Schiro, III.
Assistant United States Attorney,
237 Post Office Building,
New Orleans, Louisiana.

12

In United States District Court

[Title omitted.]

Agreed statement of facts

Filed March 15, 1945

It is hereby stipulated and agreed that this case be submitted to the Court upon the following statement of facts, to wit:

I

Sam Wiener, Jr., the father of the plaintiffs, was a native born citizen of the United States. He died on December 10, 1942, in Shreveport, Louisiana, where he had been domiciled for more than forty years, leaving a last will and testament in which he constituted the present plaintiffs his sole heirs. The will was duly

probated in the First Judicial District Court of Caddo Parish, the probate court having jurisdiction in the premises, and judgment was therein rendered sending these plaintiffs, as the sole heirs of the said decedent, into possession of all of the property of the decedent. Conformably to the practice in Louisiana, the debts being inconsequential, there was no administration, and consequently no appointment of an executor or administrator.

II

The said decedent was married in 1907, in Shreveport, to Florence Loeb, with whom he lived in that relation until his death.

During the marriage, said Sam Wiener, Jr., was engaged in many different kinds of business, such as the grocery business, lumber business, real estate and later, in investments of various character. All assets of every character, movable and immovable, which stood or record or in the possession of the decedent at the time of his death (with the exception of certain realty in Mississippi) was acquired by, and fell into the ownership of the
13 marital community which had existed between him and his surviving wife. At no time during the existence of the community was Mrs. Wiener ever employed in a gainful occupation outside of the household, nor did she receive from anyone salary or other compensation for such personal services, nor was any part of the community property derived originally from any separate property owned by Mrs. Wiener.

III

Within the delay fixed by law, the plaintiffs, in their capacity as the sole heirs of Sam Wiener, Jr., deceased, filed with the Bureau of Internal Revenue their Estate Tax Return, Form 706. In that return, they reported a net estate of Four Hundred Seven Thousand Two Hundred Eighty-Six Dollars and Thirty-Three Cents ($407,286.33) for the additional tax, and a net estate of Three Hundred and Sixty-Seven Thousand Two Hundred Eighty-Six Dollars and Thirty-Three Cents ($367,286.33) for the basic tax.

In said Estate Tax Return, these plaintiffs reported the entire value of all the separate property owned by their father, plus the one-half of the net value of the community which had existed between their father and his surviving wife. Included in said community, and therefore reported only to the extent of one-half thereof, were fifteen policies of life insurance contracted for by decedent during the said marriage, all naming the wife as beneficiary, and each and all of the premiums on which had been paid for with community funds. Each of said policies reserved the

right to the insured of changing the beneficiary. The face value of said policies aggregated Seventy-Seven Thousand Three Hundred Seventy-One Dollars and Seventy Cents ($77,371.70), of which, as aforesaid, one-half was reported in said Estate Tax Return.

Under the return as filed, there was an estate tax liability of One Hundred Seven Thousand Seventy-Eight Dollars and Forty-Seven Cents ($107,078.47), which sum, contemporaneously with the filing of their return, plaintiffs paid to the defendant, as Collector of Internal Revenue for the District of Louisiana, at New Orleans.

IV

The said Estate Tax Return, following the usual process of the Bureau of Internal Revenue, was referred to Field Agents for audit. As a result thereof, certain deficiencies were proposed, which formed the basis of protest. After hearing of the said protest, in accordance with the applicable regulations of the Bureau of Internal Revenue, a deficiency was proposed in the sum of One Hundred Sixty-Five Thousand Eight Hundred Twenty-One Dollars and Fifty-Seven Cents ($165,821.57), together with interest. This deficiency was based upon the
14 holding by the Bureau of Internal Revenue that the valuation of the net estate for the purpose of the basic tax was Nine Hundred Eight Thousand Two Hundred Eighty Dollars Thirty-Nine Cents ($908,280.39), and for the additional tax, Nine Hundred Forty-Eight Thousand Two Hundred Eighty Dollars Thirty-Nine Cents ($948,280.39). This increase results in part from

(a) the Bureau's inclusion in the taxable net estate of the decedent of the total value of all of the community property of every character; and

(b) the inclusion of the total proceeds of the life insurance above referred to, the addition from that source being Thirty-Eight Thousand Six Hundred Eighty-Five Dollars Eighty-Five Cents ($38,685.85).

Notice of such deficiency issued to these plaintiffs as the sole heirs of Sam Wiener, Jr., pursuant to § 930 of Title 26 of the United States Code, and said amount, i. e., the principal sum of One Hundred Sixty-Five Thousand Eight Hundred Twenty-One Dollars and Fifty-Seven Cents ($165,821.57), and interest in the amount of Thirty-Eight Hundred Seven Dollars and Eight Cents ($3,807.08) was paid by plaintiffs to the present defendant, Joachim O. Fernandez, in his official capacity as Collector of

Revenue for the District of Louisiana, on August 10, 1944. The payment was made by Samuel G. Wiener, William E. Wiener, and Jacques I. Wiener, heirs of the Estate of Sam Wiener, Jr., in response to a formal "Notice of Assessment and Demand" on the usual government form addressed by the Honorable J. O. Fernandez, Collector of Internal Revenue, to "Estate of Sam Wiener, Jr., Samuel G. Wiener, William E. Wiener, and Jacques L. Wiener, Heirs," and in connection with said payment, said "Notice and Demand" was returned to plaintiffs marked "paid" as of August 10, 1944, by the Collector of Internal Revenue at New Orleans.

The said amount was paid by petitioners solely to avoid the accumulation of interest and the imposition of penalties which otherwise would have been imposed if such additional assessment had not been so paid.

The aforesaid Collector, on the other hand, in demanding such taxes and interest, had—in law—probable cause therefor, in that he was acting in accordance with instructions of his superior officer; and in the event of a decision in this case adverse to this defendant, he is entitled to a Certificate of Probable Cause.

15

V

On August 12, 1944, these plaintiffs filed their claim for refund of the amount sued for herein, said claim being filed on the official Form 843.

On October 31, 1944, said claim for refund was rejected in its entirety by the Commissioner of Internal Revenue.

VI

There exists no controversy between the parties respecting valuations. The amount claimed by the plaintiffs in their claim for refund, and which forms the subject matter of this suit, represents that part of the deficiency assessment resulting entirely from the application by the Bureau of Internal Revenue of the provisions of Section 402 (b) (2) and of Section 404 (a) of the Federal Revenue Act of 1942; that is to say, in the inclusion by the Bureau of Internal Revenue in the taxable estate of the decedent the entire community property (rather than only one-half thereof as returned), including the entire proceeds of the life insurance above referred to.

In the event it should be held that only one-half of the community property is taxable the deductions shall be adjusted so as to eliminate one-half of the community debts and expenses.

In witness whereof, the attorneys of record of the respective parties have executed this agreement on the 14th day of March 1945.

SIDNEY L. HEROLD,
Sidney L. Herold,
CHARLES E. DUNBAR, Jr.,
Charles E. Dunbar, Jr.,
Attorneys for Plaintiffs.

HERBERT W. CHRISTENBERRY,
Herbert W. Christenberry,
United States Attorney,

A. P. SCHIRO, III,
A. P. Schiro, III,
Assistant United States Attorney,
Attorneys for Defendant.

16 In United States District Court

Minute entry

March 15, 1945

Case called, hearing and submission.

This cause came on this day to be heard before the Court on the pleadings, evidence and stipulation of fact.

Present: Sidney L. Cousin; Charles E. Dunbar, Attorneys for plaintiff. A. P. Schiro, III, U. S. Asst. Attorney; J. P. Garland, Special Asst. to Attorney General.

Whereupon, after hearing argument of counsel for respective parties the matter was taken under submission by the Court, and the plaintiffs were allowed until Monday March 19, 1945 to file briefs.

17 In United States District Court, Eastern District of Louisiana, New Orleans Division

No. 956 Civil Action

SAMUEL G. WIENER, WILLIAM B. WIENER, JACQUES L. WIENER

vs.

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE

Herold, Cousin and Herold (Sidney L. Herold); Phelps, Dunbar, Marks and Claverie (Charles E. Dunbar), Attorneys for Plaintiffs.

Samuel O. Clark, Jr., Assistant Attorney General; Andrew D. Sharpe, Helen R. Carloss, James P. Garland, Special Assistants to the Attorney General; Herbert W. Christenberry, United States Attorney, Attorneys for Defendant.

R. N. Gresham, Palmer Hutcheson, J. P. Jackson, Harry C. Weeks, Amici Curiae.

Opinion

(Filed March 31, 1945)

BORAH, District Judge.

This action was filed by the universal legatees and heirs of Sam Wiener, Jr., deceased, to recover an alleged overpayment of Federal Estate taxes in the amount of $162,329.59, with interest. The case was tried by the court without a jury on an agreed statement of facts. The stipulated facts, incorporated herein by reference, reveal the following:

Plaintiffs are the sons of Sam Wiener, Jr., who died on December 10, 1942 in Shreveport, Louisiana, leaving a last will and testament in which he constituted the present plaintiffs his sole heirs. Decedent was married in Shreveport, Louisiana, in the year 1907 to Florence Loeb with whom he lived from that time until his death.

18 "During this marriage, Sam Wiener, Jr., was engaged in many different kinds of business, such as the grocery business, lumber business, real estate, and later, in investments of various character. All assets of every character, movable and immovable, which stood of record or in the possession of the decedent at the time of his death (with the exception of certain realty in Mississippi) was acquired by, and fell into the ownership of the marital community which had existed between him and his surviving wife. At no time during the existence of the community was Mrs. Wiener ever employed in a gainful occupation outside the household, nor did she receive from any one salary or other compensation for such personal services, nor was any part of the community property derived originally from any separate property owned by Mrs. Wiener."

In the Federal Estate Tax Return filed on behalf of the estate of Sam Wiener, Jr., deceased, plaintiffs reported the entire value of all of the separate property owned by decedent, plus the one-half of the net value of the community which had existed between decedent and his surviving wife. Included in said community, and therefore reported only to the extent of one-half thereof, were fifteen policies of life insurance contracted for by decedent during the said marriage, all naming the wife as beneficiary, and each and all of the premiums on which had been paid with community

funds. Each of said policies reserved the right to the insured of changing the beneficiary.

Under the return as filed there was an estate tax liability of $107,078.47 and this sum was paid.

In the audit of the Federal Estate Tax Return the Commission of Internal Revenue assessed a dificiency of federal estate taxes of $165,821.57, which together with interest in the amount of $3,807.08 was paid by plaintiffs to defendant herein on August 10, 1944. The additional assessment resulted in part from the inclusion by the Commissioner of Internal Revenue in decedent's taxable estate of the entire value of all of the community property of every character and the inclusion in the taxable estate of the total proceeds of the life insurance above referred to.

Claim for refund of the amount sued for herein was filed
19 by plaintiffs on August 12, 1944, and said claim was rejected in its entirety by the Commissioner of Internal Revenue on October 31, 1944.

"There exists no controversy between the parties respecting valuations. The amount claimed by the plaintiffs in their claim for refund, and which forms the subject matter of this suit, represents that part of the deficiency assessment resulting entirely from the application by the Bureau of Internal Revenue of the *the* provisions of Section 402 (b) (2) and of Section 404 (a) of the Federal Revenue Act of 1942; that is to say, in the inclusion by the Bureau of Internal Revenue in the taxable estate of the decedent the entire community property (rather than only one-half thereof as returned), including the entire proceeds of the life insurance above referred to."

Section 811, subsections (e) and (g) of the Internal Revenue Code, the applicable statute, was amended by Sections 402 (b) (2) and 404 (a), respectively, of the Revenue Act of 1942. This case presents the question of the constitutional validity of Sections 402 (b) (2) and 404 (a). For convenience of discussion I shall hereinafter refer only to Section 404 (b) (2) as the constitutional questions raised by plaintiffs in respect to this amending section apply with equal force to Section 404 (a).

Section 402 (b) (2) of the Revenue Act of 1942 provides that there shall be included in a decedent's gross estate the full value of all property—

"to the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compen-

sation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

20 By its express terms this statute provides that all property held by a decedent and spouse in community shall be included in the gross estate of the decedent, except that portion shown to have been received as compensation for personal services actually rendered by the survivor, or derived from such compensation, or from the separate property of the survivor, but in no case shall such interest included in the gross estate be less than the share over which the decedent had a testamentary power of disposition.

The community property with which we are concerned in the instant case is of the type which does not fall within either exception in the statute. We have therefore a type of community property in which the first spouse to die is taxed on the whole, including the survivor's share.

The fact that section 402 (b) (2) allows all property which can be shown to have been received for personal services actually rendered or derived originally from such compensation or from separate property of the surviving spouse does not operate in aid of its validity in Louisiana. All income of the husband is presumed under the law of this state to be community property (Civil Code Art. 2405). Furthermore "compensation for personal services actually rendered" falls into the community (Article 2402) regardless of whether such service be rendered by the husband or by the wife living together as such. To charge the heirs with the burden of showing what part of the community consisted of the survivor's separate earnings or separate property would not only be impracticable but would have the effect of denying one of the most important principles of the community property system, the theory that the gains of the community automatically vest in the husband and wife equally, each having full ownership of one-half of such gains. (Arts. 2402, 2406.) Moreover, section 402 (b) (2) itself denies this allowance by providing that in no case may the gross estate be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. Thus the statute first states, in

21 effect, that community property, for taxation purposes, will be regarded as the separate property of each spouse to the extent that it was earned by that spouse, then suddenly announces a recognition of the surviving spouse's half interest in the community, regardless of its source by providing that the estate of the spouse dying first is taxable to the extent of at least one-half the community in all instances.

The Federal estate tax is not a tax on property, but on the transmission of property from the dead to the living. United States v. Perkins, 163 U. S. 625; Plummer v. Coler, 178 U. S. 115. This statute abolishes completely as to community partnership property only the test of ownership at death as being the controlling factor in measuring the tax, and substitutes therefor, as to the bulk of such property, the conception of dual, but complete, ownership by both spouses, so that this bulk is taxed as a part of the gross estate on the first to die, depending not on source, actual ownership or management, but upon the accidental circumstance of which spouse predeceases the other. As to that property received or derived from compensation for personal services actually rendered or traceable to income from separate property, the source controls only in the event the first to die received the compensation or owned the separate property, and all such property must be included in such recipient's gross estate. If the first to die did not receive the compensation or the derivatives from separate property, source is completely disregarded, and one-half is included in the gross estate of such decedent. Power of testamentary disposition limits the amount to be included in the gross estate, so it can not in any case be less than the amount over which the decedent had power of testamentary disposition and thus in certain events a third and different rule of taxation is applied.

"The nature and character of the right of the wife in the community for the purpose of taxation is peculiarly a local question" and determination of the state court thereto is not reviewable by the Supreme Court. Moffitt v. Kelly, 218 U. S. 400, 406; Lang v. Commissioner, 304 U. S. 264. As was said, United States v. Goodyear, 99 F. (2d) 523, 526, "the present rule seems to
22 be that community property law is applicable in determining the amount of the gross estate" for federal estate tax purposes. "Every marriage contracted in this state, superinduces of right partnership or community of acquest or gains if there be no stipulation to the contrary," (Article 2399), and it is the settled law of Louisiana "That this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired." Succession of Wiener, 203 La. 649, 657, 14 So. (2d) 475.

"In Louisiana the wife has a present vested interest in community property equal to that of her husband." Bender v. Pfaff, 282 U. S. 127,132. "The wife's rights in and to the community property do not rest upon the mere gratuity of her husband; they are just as great as his and are entitled to equal dignity." Succession of Wiener, supra, at page 666. The rights of the wife as well as those of the husband in and to the marital gains grow out

of the marriage contract itself and do not originate only when it is dissolved. She is the half partner and owner of all the acquisitions made during the existence of the community whether they be property or income. She is afforded the same privilege as her husband of disposing of her interest therein by will, and in the absence of a will, at her death her interest in the community property passes to her legal heirs in the same manner as her husband's interest therein passes to his legal heirs, in the absence of a will.

The Louisiana Code speaks of the community always as a partnership, the husband being its manager. The husband is the managing partner of the partnership but his powers of management are restricted and circumscribed. His management of the wife's interest in the property terminates upon separation, upon divorce; upon a showing of fraud, or whenever the husband proves to be incompetent, a bad manager, of a reckless and speculative disposition or whenever his affairs are in such disorder that her property rights are jeopardized. Under the statutes of Louisiana the wife can by ante-nuptial agreement with her husband stipulate that there shall be no community, or by agreement make herself rather than him the managing partner, or agree that the community partnership shall be managed jointly by husband and wife or vary the partnership agreement in any other way they see it. Failure
23 to exercise such option carries with it the conclusive presumption that they had elected that future acquisitions should be under the regime of the ordinary community which "consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife and of the estate which they may acquire during the marriage," etc. (Article 2402.) Accordingly all property found in the possession of either spouse upon dissolution of the community is presumed to be community partnership property unless it can be clearly identified as belonging to the separate estate of one or the other (Art. 2405). The source and nature of community partnership property was summarized in Succession of Wiener, supra, and it would serve no useful purpose to repeat that summarization here.

I believe in the reality of the wife's interest in the Louisiana marital community, and I believe in the inequity of taxing a decedent's estate with respect to wealth which he never owned. These principles the statute patently ignores.

The law in question clearly violates the principle announced in Hoeper v. Tax Commission, 284 U. S. 206,215 that "any attempt * * * to measure the tax of one person's property * * * by reference to the property * * * of another is contrary to due process of law."

In Heiner v. Donnan, 285 U. S. 312, 326, 327, the court said: "That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. Nichols v. Coolidge, 274 U. S. 531, 542; Brushaber v. Union Pac. R. Co., 240 U. S. 1, 24–25; Tyler v. United States, 281 U. S. 497, 504." And then after discussing the Hoeper case the court said:

"In substance and effect, the situation presented in the Hoeper case is the same as that presented here. * * *. *The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description.* Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the Schlesinger and Hoeper cases condemn as arbitrary and a denial of due process of law. *Such an action is not taxation but spoilation.* 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.' United States v. Railroad Co., 17 Wall. 322, 326." [Italics supplied.]

The statute cannot be supported on the basis that economic benefits were shifted by death. It is quite true that there is frequently a shift in management at the husband's death, but the rights held by the wife when contrasted to the restrictions and circumscribed agency powers of the husband do not lend support to the view that the husband's death confers a real or substantial economic benefit on the wife with respect to the one-half interest in the partnership property, which she has always owned. A shift of bare management powers is not a shift in economic interests and cannot be made the subject of the tax. That the tax must be measured by the shifting of real economic benefits as distinguished by mere agency or trust powers is shown by the decision of Reinecke v. Northern Trust Company, 278 U. S. 339, 346–347; Poe v. Seaborn, 282 U. S. 101, 113. But, be this as it may, the statute is not limited in its application to the case where the husband died first. The language compels its equal application where the husband is the survivor. It expressly provides that there shall be included in the taxable estate of the decedent "the interest therein held as community property by the decedent and the surviving spouse." The decedent may well be the wife and the surviving spouse the husband. In such case it is not believed that any one familiar with Louisiana law would have the temerity to urge that the husband had acquired any right by his wife's death. Yet the statute operates equally in the assumed case as under the facts here involved.

On settled principles and from the authorities it is clear that if the statute be invalid in the case of the predecease of the wife it is equally invalid in the case where it is the husband who died first. United States v. Reese, 92 U. S. 214, 221; Poindexter v. Greenhow, 114 U. S. 270, 304–305; Howard v. I. C. R. Co., 207 U. S. 463, 501; Butts v. M. & M. Transportation Co., 230 U. S. 126, 134; Bowman v. Continental Oil Co., 256 U. S. 642, 648; 11 Am. Jur., Constitutional Law, Secs. 152, 155, 160, pages 834, 837, 842–845, 854–855.

25 The committee reports show that section 402 (b) (2) was enacted upon the theory that its constitutionality was assured under the cases of Tyler v. United States, supra, and United States v. Jacobs, 306 U. S. 363. But these cases do not support the amendment. Technically many grounds exist for distinguishing the issue involved in the common law devices of concurrent ownership from the problem of community property. In tenancy by the entirety and joint tenancy, neither party has the power of testamentary disposition before the death of the other. In both instances the doctrine of survivorship is the predominant and distinguishing feature, the interest of the decedent automatically vesting in the survivor.[1] Under the community property system each spouse has the full power of testamentary disposition over one-half of the community property at all times and the surviving spouse obtains the decedent's share of the community in full ownership only in case there are no ascendants or descendants.

Tenancy by the entirety and joint tenancy are created only by a private conveyance or devise and are disfavored in most common law states in preference to tenancy in common. In Louisiana the marriage of the parties automatically superinduces the community property system unless there is stipulation to the contrary, and all property, real and personal, acquired during the marriage is presumed to fall into the community. In the Tyler and Jacobs cases death became the generating source of important and definite accessions to the survivor's property rights and all the property came mediately or immediately to the tenancy as a pure gift from the decedent. In Louisiana the wife's interest does not proceed from a gratuity nor does the death of a community partnership spouse generate added property rights in the survivor's one-half of the property.

In the Tyler case the statute expressly included such estates but also expressly excepted "such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent." And as to the estate held to be taxable it is said: "None of the property constituting it had, prior to its

[1] 14 Am. Jur., Cotenancy, Secs. 6, 7, 8, 12, 15, 86.

creation, ever belonged to the surviving spouse." This was a just basis for the decision. But neither the Tyler case nor the Jacobs case has the remotest application to community partnership property.

26 In view of the foregoing the court deems it unnecessary to pass on the remaining constitutional questions raised by plaintiffs.

Findings of fact

The court finds as the facts the allegations of fact contained in the complaint, to the extent that they were admitted by the defendant's answer, and the additional facts contained in the written stipulation on file. These are incorporated herein by reference.

Conclusions of law

1. Section 402 (b) and Section 404 (a) of the Revenue Act of 1942 are unconstitutional and void, being in conflict with the requirements as to due process contained in the 5th Amendment to the Constitution of the United States.

2. Plaintiffs are entitled to recover from the defendant the aforesaid sum of $162,329.59 with interest at the rate of six percent per annum from August 10, 1944 until paid.

The clerk is directed to enter judgment accordingly.

(Sgd.) WAYNE G. BORAH,
United States District Judge.

NEW ORLEANS, LOUISIANA, *March 31st, 1945.*

27 In United States District Court, Eastern District of Louisiana, New Orleans Division

No. 956, Civil Action

SAMUEL G. WIENER, WILLIAM B. WIENER, JACQUES L. WIENER

vs.

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE

Judgment

Filed March 31, 1945

This cause having come on regularly for trial before the court without a jury, and having been submitted for decision and judgment on the pleadings and agreed statement of facts filed therein,

and the court having hear the arguments of the attorneys for the respective parties and having duly considered said pleadings and agreed statement of facts, it is now, for the written reasons on file.

Ordered, adjudged, and decreed that the plaintiffs do have and recover of and from the defendant the sum of One Hundred Sixty-two Thousand Three Hundred Twenty-nine and 59/100 ($162,329.59) Dollars, with interest thereon from August 10, 1944, at the rate of six percent (6%) per annum, until paid.

NEW ORLEANS, LOUISIANA, *March 31st, 1945.*

28 In United States District Court

Petition for appeal

Filed March 31, 1945

To the District Court of the United States, Eastern District of Louisiana, New Orleans Division:

Joachim O. Fernandez, United States Collector of Internal Revenue, does hereby appeal from the judgment made and entered in this cause on March 31, 1945, to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and petitions that this appeal be allowed, and that citation issue, as provided by law, and that a transcript of the record, proceedings, and papers upon which said judgment is based, duly authenticated, may be transmitted to the Supreme Court of the United States at Washington, D. C. A statement of jurisdiction is presented herewith.

Dated at New Orleans, Louisiana, this 31st day of March 1945.

(Signed) HERBERT W. CHRISTENBERRY,
United States Attorney,
Eastern District of Louisiana,
New Orleans Division.

29 In United States District Court

Order allowing appeal

Filed March 31, 1945

Petition and motion of Joachim O. Fernandez, United States Collector of Internal Revenue, for appeal from the final judgment and order of this Court is hereby granted and the said appeal is hereby allowed.

It is further ordered that a certified transcript of the record, proceedings, and papers be transmitted to the Supreme Court of the United States at Washington, D. C.

Dated at New Orleans, Louisiana, this 31st day of March 1945.

(Signed) WAYNE G. BORAH,
United States District Judge.

[Citation in usual form showing service on Charles E. Dunbar, filed April 5, 1945, omitted in printing.]

46 In United States District Court

[Title omitted.]

Assignment of errors

Filed March 31, 1945

Joachim O. Fernandez, United States Collector of Internal Revenue, assigns the following errors:

1. The Court erred in granting judgment for plaintiffs.

2. The Court erred in failing to hold valid and constitutional the provisions of Section 811 (3) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942, requiring the inclusion in the taxable estate of Sam Wiener, Jr., deceased, of the entire value of the community property held by decedent and his surviving spouse.

3. The Court erred in holding that the provisions of Section 811 (3) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942 violated the due process clause of the Fifth Amendment to the Constitution.

4. The Court erred in failing to hold valid and constitutional the provisions of Section 811 (g) of the Internal Revenue Code, as amended by Section 404 (a) of the Revenue Act of 1942, requiring the inclusion in the taxable estate of Sam Wiener, Jr., deceased, of the entire proceeds of life insurance policies on decedent's life, payable to beneficiaries other than the estate.

47 5. The Court erred in holding that the provisions of Section 811 (g) of the Internal Revenue Code, as amended by Section 404 (a) of the Revenue Act of 1942, violated the due process claim of the Fifth Amendment to the Constitution.

(S) HERBERT W. CHRISTENBERRY,
United States Attorney,
Eastern District of Louisiana,
New Orleans Division.

48 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed March 31, 1945

To the Clerk, United States District Court, Eastern District of Louisiana, New Orleans Division:

The appellant hereby requests that, in preparing the transcript of the record in the above-entitled cause for his appeal to the Supreme Court of the United States, you include the following:

1. Docket entries.
2. Complaint.
3. Answer.
4. Stipulation.
5. Opinion of this Court.
6. Judgment.
7. Petition for appeal, showing the date of filing thereof.
8. Assignment of errors.
9. Order allowing appeal.
10. Jurisdictional statement.
11. Praecipe for transcript of record.

49 12. Proof of service on appellees of petition for appeal, order allowing appeal, assignment of errors, statement as to jurisdiction and statement to appellees directing their attention to the provisions of Rule 12, paragraph 3, Revised Rules of the Supreme Court of the United States.

13. Statement to appellees directing their attention to the provisions of Rule 12, paragraph 3, Revised Rules of the Supreme Court of the United States.

Filed at New Orleans, Louisiana, this 31st day of March 1945.

(S) HERBERT W. CHRISTENBERRY,
United States Attorney,
Eastern District of Louisiana,
New Orleans Division.

51 [Clerk's certificate to foregoing transcript omitted in printing.]

52 In the Supreme Court of the United States

Statement of points relied upon, and designation of entire record for printing

Filed April 20, 1945

Pursuant to Rule 13, paragraph 9, of the Revised Rules of this Court, appellant states that he intends to rely upon all of the points in his assignment of errors.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for consideration of the points relied upon.

CHARLES FAHY,
Solicitor General.

Service acknowledged this 17th day of April 1945, and appellees hereby consent to the designation of record made above by appellant.

CHAS. E. DUNBAR,
Attorney for Appellees.

[File endorsement omitted.]

53 Supreme Court of the United States

Order noting probable jurisdiction

May 7, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] Enter the Attorney General. File No. 49611. Eastern Louisiana, D. C. U. S. Term No. 1158. Joachim O. Fernandez, United States Collector of Internal Revenue, Appellant vs. Samuel G. Wiener, William B. Wiener, and Jacques L. Wiener. Filed April 13, 1945. Term No. 1158 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1945